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No. 71-1047

In the Supreme Court of the United States

OCTOBER TERM, 1971

SILAS WALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on four counts charging narcotics offenses, including possession of illegally imported cocaine (21 U.S.C. (1964 ed.) 174) and sale of cocaine not in pursuance of an official order form (26 U.S.C. (1964 ed.) 4705(a)). Petitioner, a prior narcotics offender, was sentenced to concurrent terms of twelve years' imprisonment and fined $5,000 (R 11, 80).[1] Initially, on January 31, 1969, the court of appeals reversed petitioner's convictions and ordered a new trial, relying on its *en banc* ruling in

[1] "R" refers to the record on appeal on file in this Court.

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United States v. *White*, 405 F. 2d 838 (C.A. 7), that the government may not introduce testimony by federal agents as to monitored narcotics transactions between a defendant and an informant carrying a concealed radio transmitter. The court ordered that its mandate be withheld pending a decision by this Court in *White* (Pet. App. A4 n. 2).[2] *White* was subsequently reversed, 401 U.S. 745, and the court of appeals then vacated its earlier judgment in this case and affirmed petitioner's convictions (Pet. App. B). On rehearing, the court of appeals determined that the presumption of knowledge of illegal importation under 21 U.S.C. (1964 ed.) 174 did not support petitioner's convictions with respect to the counts charging possession of cocaine (Counts II and IV), and it remanded with instructions to vacate petitioner's sentence as to those counts. The court did not, however, disturb its affirmance of petitioner's convictions for illegal sales of cocaine (Pet. App. C).

1. Petitioner contends that the trial court erred in refusing to give a "missing witness" instruction. This claim was considered and properly rejected by the court of appeals in its original opinion below, upon which we rely (Pet. App. A3–4).

2. Petitioner also argues (Pet. 17) that the jury could not have separated the sale counts from the possession counts and that reversal of convictions for the latter requires as a new trial as to the former. The offenses were not complicated. The trial court instructed

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[2] The government's petition in that case was filed on February 6, 1969. A writ of certiorari was granted on April 7, 1969 (394 U.S. 957).

the jury that petitioner was charged with a separate crime in each count of the indictment and that it should consider the evidence pertaining to each count separately (T. 404).[3] The jury was also instructed that under 26 U.S.C. 4705 the government must prove a sale not pursuant to an official written order form (T. 400–402). Consequently, the jury was well aware that, in order to find petitioner guilty as a result of illegal cocaine sales, more was required than proof of possession. Petitioner's assertion that the jury was confused as to the sale counts by the instruction as to an inference of knowing importation on the possession counts is no more than speculation.

3. Petitioner's remaining argument is that the court of appeals' judgment reversing his convictions became final and, thus, that he is entitled to a new trial. Following the initial judgment, the government filed a timely motion seeking an extension of time within which to file a petition for rehearing. The motion was granted extending the time until March 7, 1969. However, no petition was filed within that time. Petitioner therefore concludes that, under Rule 41 of the Federal Rules of Appellate Procedure, the court below was required at that time to issue its mandate reversing petitioner's convictions and ordering a new trial. The argument is not sound since the issuance of the court of appeals' mandate did not depend upon whether the government sought a rehearing. The court itself in its initial decision (Pet. App. A4 n. 2) had enlarged

[3] "T." refers to the transcript of trial proceedings on file in this Court.

the time before which its mandate would issue—*i.e.*, not before a decision in *White, supra,* decided April 5, 1971 (401 U.S. 745). That decision having reversed the Seventh Circuit's rule with respect to monitoring by informers and undercover agents, the court of appeals could properly vacate its original reversal of petitioner's conviction.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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